FILE COPY.

No. 19771

Supreme Court of the United States

OCTOBER TERM, 1905

Office Supreme Court U.
FILED
APR 26 1906

No. 25

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON AND PHILLIPS INVESTMENT COMPANY,
APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

APPELLES' MOTION TO DISMISS APPEAL OR AFFIRM.

ALEXANDER & THOMPSON,
MCLAURIN & WOZENCRAFT,
SPOONTS, THOMPSON & BARWISE,
ETHRIDGE & BAKER,
Solicitors for Appellees.

No. 19771

Supreme Court of the United States

OCTOBER TERM, 1905

No. 270

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON AND PHILLIPS INVESTMENT COMPANY, APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

APPELLES' MOTION TO DISMISS APPEAL OR AFFIRM.

TO THE HONORABLE,
THE SUPREME COURT OF THE UNITED STATES:

Now come Appellees herein, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company, by their solicitors and move the Court to dismiss the appeal herein of The Fidelity Mutual Life Insurance Company, Appellant,

and for specification of the grounds urged in this behalf, these Appellees respectfully show:

FIRST.

This Court is without jurisdiction to hear and determine this appeal, for that it manifestly appears from the records herein, that if the Constitution of the United States was in any manner involved in this cause in the Circuit Court, or is in any manner involved in this Court, same touches and concerns an issue as to the jurisdiction of the Circuit Court, and that jurisdiction alone was drawn in question thereby, and was decided in appellant's favor in the Circuit Court, and therefore this Court has no jurisdiction.

SECOND.

This Court is without jurisdiction in this behalf, for that it manifestly appears from the record herein, that appellant invoked and sustained the jurisdiction of the Circuit Court solely on the ground of diversity of citizenship, and therefore should have appealed to the Circuit Court of Appeals for the Fifth Circuit of the United States.

THIRD.

In order to give the Supreme Court jurisdiction from the Circuit Court on a federal question, it must appear that the suit is one in which the question was really involved in the rendition of the judgment complained of, and that the question was controlling or at least material.

FOURTH.

The fact that the suit was brought to vacate a former judgment at law in the same court does not give this Court jurisdiction.

FIFTH.

The party defeated on the final judgment in the Circuit Court must elect whether he will go direct to the Supreme Court on the question of its jurisdiction alone or to the Circuit Court of Appeals on the whole case.

SIXTH.

There should be an assignment or specification of error embracing and complaining of the ruling of the Court below on the question presented to give this Court jurisdiction. The question is not certified to this C

STATEMENT.

On December 2, 1897, Mrs. Jennie M. Mettler, a *feme sole*, now Mrs. Smythe, filed suit against the appellant, The Fidelity Mutual Life Insurance Company, then named The Fidelity Mutual Life Association of Philadelphia, in the District Court of Dallas County, Texas, at Dallas, on three policies of life insurance, each for the sum of Five Thousand Dollars ($5,000), on the life of her brother, W. A. Hunter. On January 4, 1898, appellant removed the cause to the Circuit Court of the United States for the Northern District of Texas, at Dallas. The trial of said cause in said Circuit Court resulted on June 2, 1900, in a verdict of the jury in favor of said Mrs. Mettler against appellant and judgment was duly entered therein by the Circuit Court on July 4, 1900, in her favor for Twenty-one Thousand, Five Hundred and Fifty Dollars ($21,550.00). Appellant's motion as amended, for a new trial was duly heard and overruled by the Circuit Court on June 25, 1900.

Thereafter, appellant, then the defendant, sued out a writ of error direct from the Circuit Court to the Supreme Court of the United States for the re-

vision of said judgment. Said cause was heard by the Supreme Court as No. 165 of its October Term, 1901, and on May 5, 1902, the judgment of the Circuit Court was affirmed by the Supreme Court. (Fidelity Mutual Life Insurance Company vs. Mettler, 185 U. S. 308). Thereafter, on June 2, 1902, before the return of the mandate from the Supreme Court to the Circuit Court, the defendant company (here the appellant) paid into the registry of said Circuit Court in satisfaction of said judgment the sum of Twenty-four Thousand and Twenty-eight Dollars and twenty-five cents ($24,028.25), by its check marked, "in full of judgment in the case of Mettler vs. Fidelity Mutual Life Insurance Company." Thereafter, on the next day, after paying out certain portions thereof to her attorneys for the legal services they had rendered her in the case, or their order, plaintiff withdrew the remainder from the registry of the court, all such disbursements being made upon checks duly issued by the Clerk of the Court and countersigned by the Circuit Judge. (Tr. 181, 213, 216).

On May, 19, 1903, appellant, as plaintiff, filed this suit in equity in the Circuit Court for the Northern District of Texas, at Dallas, against Mrs. Jennie M. Smythe, formerly said Mrs. Mettler, and James N. Smythe, her husband, *pro forma*, and said William H. Clark, Charles A. Culberson, Morris A. Spoonts and Phillips Investment Company, defendants, asking, (1) to restrain said defendants from making use of said judgment at law recovered by Mrs. Mettler as the basis of a plea of res adjudicata in any proceeding brought to reclaim the money paid by it in satisfaction of said judgment as aforesaid, and (2) to obtain a decree against each of said defendants who had

received said money paid by it in satisfaction of said judgment, as aforesaid, for the several amounts so received by each of them. (Tr. 1-21, 30-34 and 73-76).

Appellees, then defendants, Clark, Culberson, Spoonts and Phillips Investment Company, presented a general demurer and specially demurred to appellant's original bill for the following reasons, to-wit: (1) because the averments of the bill did not make or state such a case as entitled complainant to the equity jurisdiction of the United States Circuit Courts under the Seventh Amendment to the Constitution of the United States; (2) because neither of these defendants are therein charged with any fraud, conspiracy, want of good faith, or other illegal act; (3) because it appears that the fraud charged against Mrs. Mettler was the material issue of said former suit; (4) because it does not appear that they or either of them are necessary or proper parties to said bill of complaint. (Tr. 20).

The Court sustained appellees said second and fourth demurrers and over-ruled the others; thereupon appellant obtained leave of the court to file its amended bill (Tr. 29) and all of the defendants answered thereto. The case was heard and determined upon the amended bill and the answers and full evidence and resulted in a decree (Tr. 88) against the appellant as to appellees, but in its favor as to Mrs. Mettler, and appellant now appeals direct to this court as to appellees. Appellees, Clark, Culberson and Spoonts, were Mrs. Mettler's attorneys in her action at law, and the money received from her by them from the proceeds of said judgment collected by her was received innocently by them and constituted their fees for the professional work and services rendered her in said case.

We quote the following from the learned Judge's statement of his conclusions upon the trial of the present suit:

"As to the defendants, other than the Smythes, "it is admitted by the complainant that each of them "was without knowledge and innocent of the fraud "which was being perpetrated on the insurance com- "pany in the suit at law. The defendants, William "H. Clark, Charles A. Culberson, and Morris A. "Spoonts, were attorneys retained by the plaintiff, "Jennie M. Mettler, at various stages in the suit at "law to represent her before the courts in the prose- "cution of her claim against the insurance company. "They and each of them, performed legal services in "the prosecution of her alleged claim, and in contem- "plation and consideration of such services received "a substantial part of the proceeds of the judgment "in the case at law after it was paid into the registry "of the Court. Here the judgment was fully satisfied "by payment. The complainant seeks to follow the "proceeds of the judgment into the hands of parties "who received it innocently and in payment for services "rendered. The record discloses that the money "was innocently received by the attorneys and inno- "cently expended by them; and I can not find any "principle, either in law or equity, which, under the "circumstances, will compel, restitution from them." (Appellants Brief, p. 25.)

Appellant's counsel, on page 100 of its brief filed herein, makes the following admission:

"In all that they did relative to the prosecution "of Mrs. Mettler's suit against the Insurance com- "pany and in accepting compensation therefor, "Messrs. Clark, Spoonts and Culberson were acting "in entire good faith, believing that Hunter was

"dead, and that their client had a legitimate cause of "action".

JURISDICTIONAL QUESTION.

On pages 61 and 62 of its brief, appellant presents the jurisdictional grounds relied on by it to give this court jurisdiction, in a manner as of course, as follows:

"All the defendants made parties to this appeal "questioned the jurisdiction of the Circuit Court to "entertain the suit on the ground that such juris- "diction was denied to it by the 7th Amendment to "the Constitution of the United States. The decisi- "on of the Circuit Court was against the defendants "and in favor of the plaintiff upon this point. Sec. "5 of the act of March 3, 1891, provides for a direct "appeal from a Circuit Court to this Court in any "case that involves the constitution of the United "States. The Statute does not make it an essential "element of the right of direct appeal to this court "that the decision of the Circuit Court upon the con- "stitutional question should have been adverse to the "appellant. It is sufficient that the construction or "application of the constitution be involved in the case".

Circuit Court:—As stated on page 2 of its brief appellant invoked and obtained the jurisdiction of the Circuit Court solely because the requisite diversity of citizenship existed and because in its nature the suit was ancillary to the orignal action at law in that court. Appellees are not complaining of the jurisdiction of the Circuit Court, but upon the bill and answers and evidence tried the case on the facts in that court.

SUPREME COURT.—The question which appellant seeks to get this court to hold gives it jurisdiction of this appeal is stated by it (Brief p. 62), as follows: "The "question to be considered is whether the Circuit "Court and this court are *deprived* of jurisdiction to "entertain the plaintiff's bill by the last clause of the "7th Amendment to the Constitution of the United "States, which reads as follows: 'And no fact tried "by a jury shall be otherwise re-examined by any "court of the United States than according to the "rules of the Common Law.'"

Instead of its being whether the Circuit Court was "deprived of jurisdiction" by the 7th Amendment, appellant seeks to *give* this court jurisdiction by raising this question itself against appellees' consent, who have tried the case with appellant on its merits and are satisfied with the jurisdiction (Circuit Court) invoked by it as aforesaid.

Appellant's specification of errors, brief page 27, do not involve any Federal question, being in substance, as follows:

The court erred in decreeing that the plaintiff take nothing by its suit against the defendants, (1) Clark, (2) Culberson, (3) Spoonts, (4) Phillips Investment Company and (5) in refusing against them the relief prayed for in its bill.

ARGUMENT.

MAY IT PLEASE THE COURT:

Appellant successfully invoked the jurisdiction of the Circuit Court, on the ground of diversity of citizenship; its complaint embracing no question of federal constitution, law or treaty; and the Circuit Court, having tried said suit on its facts and merits and rendered judgment against appellant, and in

favor of appellees, appellant now questions the jurisdiction of said Circuit Court to give this court jurisdiction. In order to bring an appeal from the Circuit Court direct to this court, since the Judiciary Act of March 3, 1891, within the 1st of the six classes of cases specified in Sec. 5, of that act, towit: "In any case in which the jurisdiction of the court is in issue," the *jurisdiction of the Circuit Court must have been in issue in the case, and must have been decided against the appellant.* It is expressly so held by this court in Carey v. H. & T. C. Ry. Co., 150 U. S. 170. Whenever the jurisdiction of the Circuit Court is questioned, and the jurisdiction is sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff who has invoked and sustained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it to this court. U. S. v. Jahn, 155 U. S. 109.

By the 6th Section of the Act of March 3, 1891, it is provided, as follows: "The judgments or "decrees of the Circuit Court of Appeals shall "be final in all cases in which the jurisdiction is "dependent entirely upon the opposite parties to "the suit or controversy being aliens and citizens of "the United States or citizens of different States."

The jurisdiction of the United States Circuit Court having therefore been invoked and acquired entirely on the ground of diversity of citizenship by appellant, it should have appealed to the Circuit Court of Appeals of the United States and not to this court. This court has frequently so construed said 6th Section.

Florida Railway v. Bell, 176 U. S. 321, p. 325.
Muse v. Arlington Hotel Co., 168 U. S. 430, 436.
Company v. Turck, 150 U. S. 138.
Borgmeyer v. Idler, 159 U. S. 408.
Ex parte Jones, 164 U. S. 691.
Loeb v. Trustees of Columbia Township, 179 U. S. 472, p. 477.

In Florida Railway v. Bell, *supra*, the Court hold:

"In order to maintain our jurisdiction it must "appear that the jurisdiction of the Circuit Court was "not dependent solely upon the opposite parties be- "ing citizens of different states. This question must "be answered upon an inspection of the declaration "of the plaintiffs in the Circuit Court. Does it dis- "close that the plaintiffs invoked the jurisdiction of "the Court because the parties were citizens of dif- "ferent states, or because the case was alleged to be "one arising under the Constitution, laws or treaties "of the United States?" We submit, that it is very clear that the case at bar is not a case arising under the constitution, laws or treaties of the United States, but was dependent solely upon diversity of citizenship.

In order to give the Supreme Court jurisdiction direct from the Circuit Court on a constitutional question, it must appear that the suit is one in which the question was really involved in the rendition of the judgment complained of, and that the question was controlling or at least material. Carey v. R. R. Co., 150 U, S., 170; Muse v. Arlington Hotel Co., 168 U. S., 430; In re Lennon, 150 U. S., 393; Ansbro v. U. S., 159 U. S. 695; Lampassus v. Bell, 180 U. S. 276; Water Co. v. Newburyport, 193 U. S.

561; W. U. T. Co. v. Railway, 178 U. S. 239; McCoin v. Des Moines, 174 U. S. 168; New Orleans v. Benjamin, 153 U. S. 411.

The fact that the appellees did demur to appellant's bill in the Circuit Court on the ground that plaintiff is not entitled to the equitable relief sought on account of the provisions of the 7th Amendment to the Federal Constitution, plaintiff having invoked the jurisdiction of the Circuit Court solely because of diversity of citizenship, the demurrer being overruled by the Circuit Court in chambers, and the defendants then answering and trying the case on its merits and recovering a decree in their favor unmixed with said constitutional question, will not give the Supreme Court jurisdiction of this appeal direct from the Circuit Court, under the 5th section of said Judiciary Act, as contended by appellant. In Muse v. Arlington Hotel Co., *supra*, the complaint, as amended, stated that plaintiff would "rely upon the following written evidence of their title for the maintenance of the action," and enumerated among them, "the 3rd article of the treaty between the United States and the French Republic of April 30, 1893," and "the 5th Amendment to the Constitution of the United States;" and the court say: "The jurisdiction of "the Circuit Court was invoked on the ground of di- "verse citizenship and not on the ground that the "case arose under the Constitution or laws of the "United States, or treaties made, or which shall be "made under their authority. And it is settled that "in order to give the Circuit Court jurisdiction of a "case as, so arising, that it does so arise, must appear "from the plaintiff's own statement of his claim. If "this case had been taken to the Circuit Court of Ap- "peals the decision would have been final under the

"6th Section of the Statute, and it might well be "concluded that therefore the writ of error would not "lie under the 5th Section."

"In respect of plaintiff's case as stated in the "complaint, the Circuit Court decided no question as "to the application or construction of the Constitu- "tion or the validity or construction of the treaty.— Writ of Error dismissed."

The fact that this suit was brought in the Circuit Court to vacate the judgment of the same court in the law case does not make this a suit arising under the Constitution, or laws, or treaties of the United States, or give this court jurisdiction.

Carey v. Railway, 150 U. S. 170.
Metcalf v. Watertown, 128 U. S. 586.
Pope v. Railway, 173 U. S. 573.

That the party defeated on final judgment in the Circuit Court must elect whether he will go to the Supreme Court on the question of jurisdiction alone, or to the Circuit Court of Appeals on the whole case, is true, as decided in McLish v. Roff, 141 U. S. 661.

To give jurisdiction to the Supreme Court under the Fifth Section of the Seventh Amendment, there must be an assignment or specification of error stating the error commited by the court below. As heretofore stated, appellant has no such assignment or specification of error in the record, for the good reason the court below ruled in its favor in reference to the "constisutional question" on demurrer, in chambers, before answer and trial, and appellant has no right to now import the question into the

cause to give this court jurisdiction. Ansbro v. U. S. 159 U. S. 695.

The Loeb Case

We find no decisions of this court conflicting with those cited above in support of this motion, not excepting the three cases cited on page 62 of appellant's brief in support of its contention that this Court has jurisdiction.

The only one of these three cases in which we find any expressions in the opinions which could be considered even a shadow in support of appellant's contention is the case of Loeb v. Trustees of Columbia Township, 179 U. S. 472, which we also cite in support of our second proposition; and properly considered there is nothing in the opinion in the Loeb case in support of appellant's contention.

Loeb sued the Trustees of Columbia Township in Hamilton County, Ohio, upon bonds issued by the Township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits, which bonds were issued in virtue of an Act of the General Assembly of Ohio.

The petition was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against the Township,—a general demurrer.

This general objection was sustained and, the plaintiff electing not to plead further, judgment was rendered for the defendant, and the case was brought direct to this court by writ of error.

The record contained in full the opinion rendered and filed by the Circuit Court when disposing of the case, and shows that the judgment was rendered

against the plaintiff in error on the ground that according to the principles laid down in Norwood vs. Baker, 172 U. S. 269, said Act of Ohio, under which the bonds sued on were issued, was repugnant to that clause of the Fourteenth Amendment of the Constitution of the United States forbidding a state to deprive any person of property without the due process of law.

The very foundation of Loeb's cause of action involved the validity of said Ohio Act plead in his petition or declaration, the full provisions of which it was the duty of the Circuit Court to take judicial knowledge of, and to pass upon its validity, and the Court holding the Ohio Act repugnant to the federal Constitution, judgment was rendered by it against the plaintiff. That is to say, the Loeb case was embraced in the Fifth Section of said Judiciary Act of March 3, 1891, providing that appeals or Writs of error may be prosecuted direct to this Court from the Circuit Courts, "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." In other words, in the Loeb case the jurisdictional question was whether the Circuit Court erred in rendering judgment against him on the ground that said Ohio law, which was the basis of the bonds sued on, was in contravention of said constitutional provision; and therefore, came within the plain letter of the Fifth Section quoted above from said Judiciary Act, and gave this Court jurisdiction in that case.

In conclusion, as the Constitution makes the express distinction between jurisdictions at law and in equity, the point raised by appellees' demurrer in virtue of said Seventh Amendment is necessarily in-

volved in every general objection to the equity jurisdiction of the Circuit Court.

It is not a question of the right of trial by jury, but of whether the case is one in equity, as the distinction between law and equity was established at the time of the adoption of the Constitution.

In Senator Culberson's answer said Seventh Amendment is pleaded, but this was entirely immaterial, as any point made thereon was equally available under his demurrer and had been decided by the Circuit Court in over-ruling his demurrer.

If this court takes jurisdiction in this case on appeal, because of a "constitutional question" being involved, it seems that the court will be taking jurisdiction in all the equity suits where the jurisdiction in equity is raised in the Circuit Courts by the demurrers.

PRAYER.

The premises considered, appellees pray that this Honorable Court do sustain this motion; and by its judgment in this behalf direct, that this appeal does not lie, and that the same be dismissed, or the judgment affirmed, and accordingly, they will ever pray.

Respectfully submitted,

W. M. ALEXANDER,
LAUCH MCLAURIN,
GEORGE THOMPSON,
F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for Appellees.

No. 19771

Supreme Court of the United States

OCTOBER TERM, 1905

Office Supreme Court U.
FILED
APR 26 1906
JAMES H. McKENNEY

No. 25

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON AND PHILLIPS INVESTMENT COMPANY, APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

APPELEES' ARGUMENT ON MOTION TO DISMISS APPEAL OR AFFIRM.

ALEXANDER & THOMPSON,
MCLAURIN & WOZENCRAFT,
SPOONTS, THOMPSON & BARWISE,
ETHERIDGE & BAKER,
Solicitors for Appellees.

No. 19771

Supreme Court of the United States

OCTOBER TERM, 1905

No. 270

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON AND PHILLIPS INVESTMENT COMPANY, APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

APPELEES' ARGUMENT ON MOTION TO DISMISS APPEAL OR AFFIRM.

TO THE HONORABLE,
THE SUPREME COURT OF THE UNITED STATES:

Now come Appellees herein, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company by their solicitors, and in support of the motion to dismiss, file this additional argument herein:

FIRST.

This Court is without jurisdiction to hear and determine this appeal, for that it manifestly appears

from the record herein, that if the Constitution of the United States was in any manner involved in this cause in the Circuit Court, or is in any manner involved in this Court, same touches and concerns an issue as to the jurisdiction of the Circuit Court, and that jurisdiction alone is drawn in question thereby, and appellant cannot avail itself of such issue here, for that said issue was not decided against it in said Circuit Court, and for that no certificate is presented to this Court from the Circuit Court, embodying said question of jurisdiction.

SECOND.

This Court is without jurisdiction in this behalf, for that it manifestly appears from the record herein, that this case and the judgment appealed from herein does not involve in any substantial sense the construction or application of the Constitution of the United States, and for that:

1. The only respect in which said Constitution of the United States has been invoked was one touching the jurisdiction of said Circuit Court;.

2. The decision of said Circuit Court in that behalf was in favor of appellant; and

3. If it be true, as contended by the appellant, that the issue made in said Circuit Court is one which has been already settled by the decisions of this Court, then no question in that respect remains for decision, and said case did not involve the construction or application of the Constitution.

THIRD.

This Court is without jurisdiction in this behalf, for that it is manifest from an inspection of the record herein, that this cause does not fall within any

provision of the statutes of the United States, allowing appeals from a Circuit Court to the Supreme Court of the United States.

STATEMENT.

Appellant, to sustain the jurisdiction of this Court over this appeal, depends upon Subdivision 4 of Section Five of the Judiciary Act, authorizing a direct appeal to this Court from any existing Circuit Court "in any case that involves the construction or application of the Constitution of the United States." Ex parte Glaser, 198 U. S., 171.

Mrs. Jennie M. Mettler on June 2, 1900, recovered judgment in the Circuit Court of the United States for the Northern District of Texas at Dallas in the sum of $21,550.00 against Fidelity Mutual Life Association upon insurance policies issued by the latter, insuring the life of William A. Hunter, a brother of the plaintiff. This judgment being brought before this Court by writ of error was affirmed on May 5, 1902. (Fidelity Mutual Life Association v. Mettler, 185 U. S., 308.) Without waiting for issuance of Mandate, the insurance company paid into the Registry of the Circuit Court at Dallas, for the use of the successful plaintiff, the amount of the judgment, principal, interest and costs, and thereupon, after paying out certain portions thereof to her attorneys and to their order as their fees, plaintiff withdrew the remainder from the Registry of the Court, under appropriate orders of the Court.

On the 19th day of May, 1903, said insurance company, having in the meantime changed its corporate name to the Fidelity Mutual Life Insurance Company, filed a bill in equity in said Circuit Court against Mrs. Mettler, (who had in the meantime be-

come the wife of James N. Smythe, and who will be hereinafter referred to by that name), and against William H. Clark, Morris A. Spoonts and Charles A. Culberson, who had been attorneys for her in the law action and to whom she had paid the above mentioned funds, as their reasonable fees, and against Phillips Investment Company, to whom Mr. Clark, out of the fee earned by him in that cause, had paid a pre-existing indebtedness, independent of, and in no manner connected with said cause. The object of the bill was to vacate the judgment in the law action, upon the alleged ground of fraud perpetrated by Mrs. Smythe, the other respondents being expressly exonerated from all participation in or knowledge of said fraud; and to recover from the present appellees the several sums of money that had been paid to them out of the proceeds of the judgment, and from Mrs. Smythe the balance remaining in her hands after discharging her obligations to these appellees.

The appellant, as such complainant in said equity suit, recovered the judgment prayed for against Mrs. Smithe, and as no appeal has been taken on behalf of Mrs. Smythe, matters concerning her are not in issue here. Its bill was dismissed against these appellees on the merits upon the grounds stated by said Circut Court, and set out by appellant in its brief as follows:

"As to the defendants other than the Smythe's, it is admitted by the complainant, that each of them was without knowledge and innocent of the fraud which was being perpetrated on the insurance company in the suit at law. The defendants, William H. Clark, Charles A. Culberson and Morris A. Spoonts were attorneys retained by the plaintiff, Jennie M.

Mettler, at various stages in the suit at law to represent her before the courts in the prosecution of her alleged claim against the insurance company. They and each of them performed legal services for her in the prosecution of her alleged claim, and in contemplation of and in consideration for such services, received a substantial part of the proceeds of the judgment in the case at law after it was paid into the registry of the court. The bill of complaint and evidence in the record disclosed with particularity the manner in which each of the attorneys who are made defendants came into posession of his portion of the fund paid into court. The various assignments, legal and equitable, are set forth and proved, in order to show the interest and part each acquired under the judgment, and also to show to what extent each participated in the fund. After consideration, I have reached the conclusion, that the rule enunciated and relied upon by counsel for complainant with relation to the assignment of judgments, to the effect, that the assignee of a judgment takes it subject to all equities existing between the litigants, whether he had notice of the same, or not, has no application under the facts of this case. Here the judgment was fully satisfied by payment. Complainant seeks to follow the proceeds of the judgment into the hands of the parties who received it innocently and in payment for services rendered. The record discloses that the money was innocently received by the attorneys and innocently expended by them, and I cannot find any principle, either of law or of equity, which under the circumstances will compel restitution from them. It is true they were put on notice of complainant's claim in the suit at law, that Hunter was not dead, but living, but in the absence of corrupt knowledge on their

part that he was living, they had a right to rely upon the solemn and deliberate judgment of the court that he was dead, and so far as they are concerned, that judgment, so entered, concludes the insurance company.

"The defendant, Phillips Investment Company, is in as favorable an attitude as any the defendant attorneys. In innocently received an assignment of a portion of the judgment from the defendant Clark, as collateral security for the debt owing to it by him and it participated in the fund paid into court in satisfaction of the judgment, and surrendered its evidence of indebtedness against Clark in consideration therefor. It is quite blameless in the premises, and, as stated with relation to the attorneys who are defendants, I know of no rule, either of law or of equity which would compel the Phillips Investment Company to return what it has received under this judgment.

"The view expressed here with relation to the attitude of defendants, other than the Smythes, should have led to the sustaining of the demurrers interposed, and insisted upon by them. It now leads to the dismissal of the bill against them, with their costs, and the decree will so provide."

The appellant in its bill of complaint in the Circuit Court depended to support the jurisdiction of that court upon diversity of citizenship between it and the respondents. It also suggests, by way of argument, in its brief herein on the merits, that its bill was in the nature of an ancillary bill to the original action. That circumstance does not of course affect the jurisdiction of this appeal. (Carey v. H. & T. C. Ry. Co., 150 U. S., 179; Holmes v. Marshall, 141 U. S., 589.) The construction or ap-

plication of the Constitution of the United States was not stated to be involved.

The appellees, by demurrer in the Circuit Court, prayed for dismissal of the bill of complaint upon the ground, that under the operation of the Seventh Amendment to the Constitution of the United States, the Circuit Court as a Federal Court was without jurisdiction to grant the relief sought by complainant. The demurrer was overruled and respondents required to answer. Each respondent thereupon filed separate answer, and the respondent, Charles A. Culberson in his answer again suggested, as had been previously done by the demurrer, that no court of the United States had jurisdiction to grant complainant the relief sought, under the facts stated in the bill, and that, therefore, same should be dismissed. Because of these pleadings appellant takes direct appeal to this Court.

Testiomony was taken, submisssion had and case disposed of on grounds wholly independent of the constitutional question, and in the exercise of jurisdiction. Of the decision on the question made as to the jurisdiction of the Circuit Court, complainant could not have complained, as its contentions were sustained, and respondents, though losing their point as to the jurisdiction of the court, having obtained a decision favorable to themselves upon the merits, are not complaining.

Complainant's specifications of errors tender no issue in this Court, to the effect that the decision of the Circuit Court upon the question of the Seventh Amendment was erroneous. It contends on the contrary. in argument that the ruling was correct. Its specifications of error are as follows:

1.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant William H. Clark, and dismissing its bill of complaint as to said defendant.

2.

"The Court erred in decreeing that the plaintiff take nothing by its suit against the defendant Morris A. Spoonts, and dismissing its bill of complaint as to said defendant.

3.

"The Court erred in decreeing that the plaintiff take nothing by its suit against the defendant Charles A. Culberson, and dismissing its bill of complaint as to said defendant.

4.

"The Court erred in decreeing that the plaintiff take nothing by its suit against the defendant Phillips Investment Company, and dismissing its bill of complaint as to laid defendant.

5.

"The Court erred in not granting to the plaintiff the relief prayed for in its bill of complaint as against each of the defendants, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company."

The Statutes Involved.

I.

Section 5 of the Judiciary Act, (U. S. Compiled Statutes, 1901, pp. 548, 549) provides in part, that appeals or writs of error may be taken from the district courts or from the existing circuit courts, direct to the Supreme Court in the following cases:

"1. In any case in which the jurisdiction of the court is in issue. In such cases the question of juris-

diction alone should be certified to the Supreme Court from the court below for decision."

Construing the quoted subdivision of Section 5, this Court has held: (1) That the question of jurisdiction may not be made the basis of a direct appeal to this Court at the instance of the party in whose favor it was decided in the trial court; and (2) that a certificate from the Circuit Court, presenting the question to this Court, is indispensable. (Courtney v. Pradt, 196 U. S. 89.)

In the case at bar, the record shows: (1) That the issue of jurisdiction was decided in favor of appellant; and (2) that no certificate from the Circuit Court, embodying the question, is presented to this Court. Therefore, if the question raised by the respondents in the Circuit Court concerns the jurisdiction of the Circuit Court, this appeal will be dismissed. That same does concern such jurisdiction, and does not touch the essential merits of the controversy between the parties, we hope to maintain to the satisfaction of this Court presently.

II.

Under Subdivision 4 of Section Five of the Judiciary Act, a direct appeal from the Circuit Court to this Court is authorized "in any case that involves the construction or application of the Constitution of the United States."

This appeal rests upon the supposed justification of the subdivision just quoted, the appellant seeking to maintain the proposition that this case does substantially involve the construction and application of the federal instrument.

It is conceded that the Seventh Amendment was invoked by the respondents; that upon that issue a

decision was had favorable to the appellant; and that the Court below rested its disposition of the case upon grounds wholly independent of the Seventh Amendment. It must also be conceded, that if the restrictions in that section of the federal compact concern the power of the Federal Courts, as such, and do not relate to primary rights of the parties litigant as such, then the case falls within the first subdivision of Section 5 of the Judiciary Act, and failing to present the indispensable prerequisites authorizing this Court to revise the judgment below, this appeal would fall.

With these preliminary observations, we respectfully submit the following:

REMARKS.

The Seventh Amendment, so far as applicable here, provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. The restraint provided for in this language rests upon the Court as a federal tribunal. Its object evidently is to deprive the Federal Court of the power to re-examine cases falling within the prohibited class. No immunity of the litigant is guaranteed, except as against the action of a federal court. No primary rights, as such, either of life, liberty or property, are created or protected by the provision. State courts are left free to proceed as they may desire unaffected by the restriction. Jack v. Kansas, 199 U. S. 372.

We make a distinction between the fundamental guaranties on the one hand, such as equal protection of the laws, due process, immunity from persecution or repeated prosecutions, provisions touching security to life, liberty and property, and those provisions on

the other hand which provide for the powers which may be exercised by the courts when erected, in giving effect to the primary guaranties. The one class of rights may be enforced anywhere and under all circumstances, while the other class, operates only to grant or restrict particular courts in the exercise of jurisdiction.

The Seventh Amendment to the Constitution of the United States is of the second class of provisions, and is to be read in connection with Section 2, Article III of the same instrument. It has the effect of limiting the judicial power granted in that section. It is in effect a proviso to that section.

That the question is one touching the jurisdiction of the Circuit Court is conceded by appellant at p. 61 of its brief on the merits, as follows:

"All the defendants made parties to this appeal question the jurisdiction of the Circuit Court to entertain the suit on the ground, that such jurisdiction was denied to it by the Seventh Amendment to the Constitution of the United States, reading as follows: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.' The decision of the Circuit Court was against defendants and in favor of plaintiff upon this point.

Section 5 of the Act of March 2, 1891, provides for a direct appeal from a Circuit Court to this Court in any case that involves the construction or application of the Constitution of the United States. The statutes does not make it an essential element of the right of direct appeal to this Court, that the decision of the Circuit Court upon a constitutional question shall have been adverse to the appellant. It is sufficient that the construction or application of the Constitution be involved in the case."

And, again, at p. 62: "The question to be considered is whether the Circuit Court and this Court

are deprived of jurisdiction to entertain the plaintiff's appeal by the last clause of the Seventh Amendment to the Constitution of the United States."

If the question, however, is not simply one of jurisdiction, then it becomes our duty to suggest to the court the particulars in which the case falls without the provisions of the Fourth Subdivision of Section Five of the Act.

1.

It falls without said provisions, because the Circuit Court decided the so-called constitutional question in favor of the appellant, and therefore he may not complain.

2.

It falls without said provisions because the case below was decided upon grounds independent of the so-called constitution questions.

3.

It falls without said provisions, because the question sought to be raised thereunder was not controlling in the disposition of the case.

4.

It falls without said provisions, because the applicable statutes provide that appellant should have taken this appeal to the Circuit Court of Appeals, in which Court, had the Seventh Amendment been again invoked by appellees, same could have been certified to this Court, or, after decision of same in said Circuit Court of Appeals, revised in this Court upon certiorari.

AUTHORITIES.

Carey v. H. & T. C. Ry. Co., 150 U. S., 181.
In re Lennon, 150 U. S., 401.
Ansbro v. U. S., 163 U. S., 697.
Cornell v. Green, 163 U. S., 75.
Lampasas v. Bell, 190 U. S., 276.
Muse v. Arlington Hotel Co., 168 U. S., 430.
Corkran Oil Co. v. Amandet, 199 U. S., 182.

Three decisions of this Court are relied upon by complainant to justify the direct appeal it has taken in this cause from the Circuit Court:

Holder v. Aultman, 169 U. S., 81.
Loeb v. Columbia Township Trustees, 179 U. S., 472.
Field v. Barber Asphalt Co., 194 U. S., 618.

In each of those cases, the appellant, who had brought his case from the Circuit Court directly to this Court, had been *injurously affected* by a ruling made in the Circuit Court upon a constitutional question, and did not occupy the position in which this appellant stands of invoking the jurisdiction of this Court, upon the ground that the Circuit Court had decided the constitutional question in its favor, and thereby predicating an appeal to this Court upon a ruling of the Circuit Court, which it maintains is correct.

In the Holder case, the plaintiff sued upon contract. The defendant relied upon a statute of Michigan. The plaintiff escaped the effect of the Michigan statute by successfully maintaining its unconstitutionality, when tested by the federal instrument, and had judgment. The defendant, who had lost his case by reason of the ruling adverse to him upon the federal question, appealed to this Court, and the appeal was sustained.

In the Loeb case, the plaintiff sued upon bonds issued by the trustees of Columbia Township. The defendant demurred, making as its third point in support of the demurrer, the claim that the act contravened the provisions of the Constitution of the United States. This point was decided for the defendant, and the plaintiff, who lost his case upon the

constitutional question alone, invoked the jurisdiction of this Court and the appeal was sustained.

In the Field case, plaintiff sued to enjoin the issuance of certain tax bills, designed to provide funds for the paving of certain streets, upon several grounds: The first being that the act under which the bills were issued was in violation of the Fourteenth Amendment, and further that the proceedings had, prior to the letting of the contract upon which the bills were issued, violated the Interstate Commerce Clause of the Constitution. The Circuit Court held against him upon the federal grounds alleged, but being of opinion that his bill was maintainable in part upon other grounds, granted in part the relief sought, and denied in part that portion of the relief which depended upon the federal questions presented. Complaining that the Circuit Court erred in not sustaining the federal grounds, Field appealed to this Court, and the appeal was sustained.

It is obvious from the foregoing statement, that the authorities upon which complainant relies, do not sustain him, and the question is one to be decided in accordance with other settled principles announced in the decisions of this Court.

The complaint appears to attach undue weight and to misconstrue the language of this Court in the Holder case, which is referred to in both of the later cases of Loeb and Field, to the effect, that the jurisdiction of this Court in cases of appeals under Subdivision 4 of Section Five of the Judiciary Act, does not depend upon the question whether the right claimed under the Constitution of the United States has been denied or upheld in the court below. That language simply means what it says, to-wit: That in such case, a different rule exists from that which

obtains in writs of error from this Court to the highest courts of the State. In that class of cases, the right asserted by a litigant under the Federal Constitution must be denied before he can bring his case to this Court as involving a federal question; (Whitten vs. Tomlinson 160 U. S. 231) but in the case of an appeal or writ of error under Section Five of the Judiciary Act, an unsuccessful litigant may depend upon his case presenting the constitutional question, even though the question *was raised by his adversary* and upheld. The language quoted does not state in terms, and we believe was never intended to present the idea, that one might bring his case to this Court where the federal question, whether presented by his adversary or himself, had been decided in his favor; but was intended to guarantee him the right of bringing his case to this Court, if the federal question had been decided against him, whether it was raised by himself or by his adversary, The language of Justice Fuller at circuit in World's Columbian Exposition v. United States, 56 Fed. Rep., 666, illustrates one phase of our position:

"The ground of the decision had no reference to the construction or application of the Constitution, or the validity of the Acts of Congress in respect to that instrument, and the conclusions upon which the order was entered were unaffected by considerations of that character. Cases in which the construction or application of the Constitution is involved, or the constitutionality of any law of the Uniten States is drawn in question, are cases which present an issue upon such construction or application or constitutionality, the decision of which is controlling. Otherwise, every case arising under the laws of the United States might be said to involve the construction or application of the Constitution or the validity of such laws."

It cannot be correctly said that a case involves the construction and application of the Constitution

of the United States, when it may be disposed of correctly without deciding the federal question. Such is the case here, if the provision is not a jurisdictional provision, that is to say, if the Court has power to hear and determine a case of the general character shown by the bill of complaint, but settled principles justify a decision favorable to the defendants, without the necessity of considering the so-called constitutional question. Unless it is essential, it is not involved.

Another ground exists for denying that the federal question is involved, if the construction of the Seventh Amendment is, as appellant contends for in its brief on the merits herein. It urges in its brief, that the Seventh Amendment applies solely to appellate courts and not to the power of the Circuit Courts, and says that the question has been a settled one in this Court for almost a century. Appellant's brief p. 68 et. seq. Crim v. Handley, 94 U. S., 652.

If this Court has settled the question, or if the provision itself is clearly applicable to appellate procedure, then in no true sense was the Constitution involved when appellees raised the point below. We do not agree with appellant, that the question of jurisdiction suggested by the application of the Seventh Amendment is a settled question; but if it is settled then it is not a question.

It may be contended, that the appellees occupy inconsistent positions here and in their brief on the merits. Such, however, is not the case. We simply present the matter in an alternative way, contending in the first place that the Seventh Amendment raises a question as to the jurisdiction simply of the Circuit Court, as a court of the United States; in the second place, that if not jurisdictional, the question is one that

cannot be availed of by the party in whose favor it was decided as a ground for invoking the jurisdiction of this Court; and in the third place, that if the Court has jurisdiction, it ought to hold under the authorities, that where the case as developed shows the appellant engaged in an attempt to re-examine a question which has been theretofore examined by a common law jury, relief should be denied. These positions are are consistent; they raise the same questions in different forms.

PRAYER.

The appellees aforesaid respectfully pray, upon the submission of the motion to dismiss or affirm, that this Honorable Court will sustain same; and by its judgment in this behalf direct, that this appeal does not lie, and that this cause be dismissed, and accordingly, they will ever pray.

Respectfully submitted,

W. M. ALEXANDER,
LAUCH MCLAURIN,
GEORGE THOMPSON,
F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for Appellees.